Supreme Court, U.S.
FILED
JUL 6
OFFICE OF THE CLERK

No. 97-1961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PETER CASTELLANO, et al.,

Petitioners,

- against -

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION

MICHAEL D. HESS,
Corporation Counsel for the
City of New York,
Attorney for Municipal Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1027 or 788-1065

LEONARD J. KOERNER,
PAMELA SEIDER DOLGOW,
JAMES J. DWYER,
JOHN HOGROGIAN,*
of Counsel.

* Attorney of Record

June 17, 1998.

COUNTER-QUESTION PRESENTED

Should this Court deny the petition for a writ of certiorari, in that the decision of the Court of Appeals does not present any issue of federal law which merits review by this Court?

TABLE OF CONTENTS

Page

COUNTER-QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI. 9

A. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability. 9

B. The Court of Appeals correctly applied established rules of law in holding that the District Court had not denied petitioners any constitutional right to discovery. 13

C. The Court of Appeals did not violate petitioners' constitutional rights by denying their motion for rehearing. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases: Page

Felde v. City of San Jose,
839 F.Supp. 708 (N.D. Cal. 1994)
aff'd, 66 F.3d 335 (9th Cir. 1995) . . . . . .

Gagliardo v. Dinkins,
89 N.Y.2d 62 (1996) . . . . . .

No. 97-1961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PETER CASTELLANO, et al.

Petitioners

- against -

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I

In this civil action, the petitioners are approximately two thousand former New York City police officers who retired because of disability. They challenge a New York statutory program which provides certain monetary benefits

(entitled variable supplements fund benefits) to police officers who retire for service after at least twenty years, but not to disability retirees. Petitioners challenge the statutory program primarily as discriminatory under the Americans with Disabilities Act and the Rehabilitation Act.

The United States Court of Appeals for the Second Circuit unanimously rejected that challenge in an opinion which appears in petitioners' appendix at pages A1 through A51. Petitioners seek review of that decision on the merits. The Court of Appeals also rejected an argument that petitioners were denied an opportunity for discovery. They seek to have this Court review that decision also.

The Court of Appeals also denied petitioners' motion for rehearing in an order which appears in petitioners' appendix at pages A73 through A74. Petitioners also seek to have this Court review that order.

II

All of the petitioners are retired New York City police officers who receive retirement benefits from the Police Pension Fund. That fund is governed by Subchapter 2 of Chapter 2 of Title 13 of the New York City Administrative Code.

At issue in this case are two basic types of retirement under the Police Pension Fund: retirement for service and retirement for disability. Retirement for disability can be for ordinary disability or for accident disability. In order to retire for service, a police officer must have rendered a minimum of twenty years of service. Administrative Code §§ 13-246 - 13-248. The officer then receives an annual retirement allowance equal to one-half of his final salary, plus one-sixtieth of his or her average annual earnings after his twentieth anniversary, adjusted by several other factors not pertinent here. Administrative

Code § 13-255. The retirement allowance is subject to federal income taxation. None of the petitioners have retired for service.

In order to retire for accident disability, an officer must be physically or mentally incapacitated from performing his or her duties as a result of an accidental injury suffered in the line of duty. Administrative Code § 13-252. Accident disability benefits are particularly coveted. An officer retiring for accident disability receives a pension of three-quarters of his or her final salary, irrespective of length of service. Administrative Code § 13-258. This retiree also receives an annuity funded by his or her member contributions and an Increased Take Home Pay pension funded by the City. Id. Those accident disability retirees who have worked beyond twenty years also receive an additional pension equal to one-sixtieth of total earnings received after the twentieth anniversary. New York

General Municipal Law § 207-d. Moreover, this retirement allowance is fully excludable from federal income taxation and qualifies for a tax exemption under Section 104(a)(1) of the Internal Revenue Code. Some of the petitioners retired for accident disability.

In order to retire for ordinary disability, an officer must be physically or mentally incapacitated from performing his or her duties as a result of something other than an accidental injury suffered in the line of duty. Administrative Code § 13-251. An officer who retires for ordinary disability receives a retirement allowance of one-third of his or her final salary if he or she served less than ten years. Administrative Code § 13-257. The officer receives a retirement allowance of one-half of his or her final salary if he or she served at least ten but less than twenty years. Id. An ordinary disability retiree with greater than twenty years of service receives an additional

allowance equal to one-fortieth of the final salary times years of service beyond the twentieth anniversary. Id. Using the higher fractional rate and the final year's salary as the pensionable compensation base, rather than the average of all years beyond twenty, provides a significant advantage for the ordinary disability retiree. By contrast, the base for the corresponding additional allowance for service retirees and accident disability retirees is the average salary received after the twentieth anniversary. Moreover, a portion of the first $5,000 of income is eligible for a federal tax credit as long as a member qualifies for Social Security disability payments. Internal Revenue Code § 22. The petitioners who did not retire for accident disability did retire for ordinary disability.

This review of the statutory provisions demonstrates that disability retirees (both ordinary and accident) enjoy certain pension benefits which service retirees do not.

III

Only police officers who retire for service receive variable supplements fund ("VSF") benefits. Subchapter 3 of Chapter 2 of Title 13 of the Administrative Code governs the Police Officer's Variable Supplements Fund. Administrative Code §§ 13-268 et seq. Subchapter 4 governs the Police Superior Officers' Variable Supplements Fund. Administrative Code §§ 13-278 et seq. The Police Officer's VSF pays a specific monetary sum to service retirees below the rank of sergeant, while the Police Superior Officers' VSF pays a similar sum to service retirees who held the rank of sergeant or higher or who were detectives. It is the statutory exclusion of disability retirees from these VSF benefits which petitioners challenge.

Administrative Code § 13-271 establishes a defined annual VSF benefit payment to each eligible police officer

retiree on a fixed schedule. Administrative Code § 13-280 does the same for eligible police superior officer retirees. By statute, only service retirees are eligible to receive these VSF benefits. Administrative Code §§ 13-268(5), 13-278(5). Disability retirees do not receive VSF benefits.

IV

The Court of Appeals affirmed the District Court's dismissal of petitioners' ADA cause of action for failure to state a claim upon which relief could be granted. That Court stated that disability retirees who did not work twenty or more years simply do not meet the VSF eligibility requirements, just as non-disabled police officers who do not work twenty or more years are not eligible (A35-A37). That Court further stated that disability retirees who did work twenty or more years had their option of either service or disability retirements and could not claim discrimination because they could not pick individual

desirable elements from the two benefit-package options (A37-A38). That Court further stated that petitioners' argument that they had been denied discovery "must be rejected as frivolous" (A49).

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners present three grounds for review by this Court. None of these grounds presents a federal question worthy of review by this Court. None of the factors set forth in Rule 10 are present in this case.

A. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability.

The Court of Appeals employed a dichotomy in analyzing the claims of the petitioners. One category of petitioner consisted of those who retired for disability after serving less than twenty years of service (A35-A37). The

other category consisted of those who retired for disability after serving twenty or more years of service (A37-A38). All of the petitioners fall into one of these two categories.

As to the petitioners who worked less than twenty years, the Court of Appeals held that the complaint failed to state a claim upon which relief could be granted (A35-A37). The Court stated its central holding as follows (A35-A36):

> The [petitioners who worked less than twenty years] are similarly situated not with twenty-year "for service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter group is not entitled to VSF benefits, there is no unlawful discrimination.

The Court cited an EEOC commentary which stated that "[w]here an employer offers ... a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees" (A36). The Court also relied upon

Gagliardo v. Dinkins, 89 N.Y.2d 62 (1996), in which the New York Court of Appeals rejected an identical ADA claim raised by retired New York City Housing and Transit police officers (A36-A37). The Court of Appeals correctly concluded that "[t]he ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service" (A37).

As to the petitioners who worked twenty or more years, the Court of Appeals again held that the complaint failed to state a claim upon which relief could be granted (A37-A38). The Court stated its central holding as follows (A38):

> Although the ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are required to take a disability benefit which is less advantageous," [citation omitted], nothing in the ADA requires an employer to provide to disabled employees the VSF benefits of a

> service plan in addition to freely-chosen disability benefits under a disability plan.

The Court relied upon Felde v. City of San Jose, 839 F. Supp. 708 (N.D. Cal. 1994), which later was affirmed without a reported decision, 66 F.3d 335 (9th Cir. 1995). All the petitioners who worked twenty or more years chose the benefits of a disability retirement. The Court of Appeals correctly held that no discrimination on the basis of disability is shown by the personal selection of one retirement plan over another.

Petitioners argue that this Court should review this case because of a split among the Courts of Appeals on the issue of whether a disabled retiree can be a qualified individual with a disability for purposes of the ADA (Petition, 7-11). Petitioners seek review by pointing to an issue on which they prevailed in this case. The Court of Appeals assumed that petitioners were qualified individuals with a disability without deciding the issue (A34). Review

of that issue would make no difference to the outcome of this case. Petitioners employ the dubious strategy of urging this Court to review this case on the basis of an issue which is not necessary to the outcome of the case, hoping that this Court will review the decision on the merits as an afterthought. This Court should deny certiorari on the merits of this case.

B. The Court of Appeals correctly applied established rules of law in holding that the District Court had not denied petitioners any constitutional right to discovery.

Petitioners make a rather obscure claim that the District Court violated their constitutional rights by dismissing the case before allowing them to conduct discovery (Petition, 15-17). This claim fails on its face, in that it does not point to any specific information which is both likely to result from discovery and relevant to whether the State has discriminated against the petitioners on the basis of disability. Instead, petitioners seek to cast a broad

net of discovery about the workings of the New York State Legislature (Petition, 16). The Court of Appeals rejected the claim as frivolous (A49). What makes the claim even more frivolous is that petitioners did not seek to conduct any discovery prior to the dismissal. This Court should deny certiorari as to petitioners' claim about discovery.

C. The Court of Appeals did not violate petitioners' constitutional rights by denying their motion for rehearing.

Petitioners argue that the Court of Appeals violated their constitutional rights to due process of the law and to equal protection of the law by denying their motion for rehearing (Petition, 11-15). This argument fails because petitioners' real complaint is with the decision on the merits by the Court of Appeals, not with the denial of the motion for rehearing.

Petitioners note that the Court of Appeals vacated the dismissal of a complaint brought by a retired New York

City firefighter in a separate case consolidated with this case for argument and decision (Petition, 11-12). That firefighter alleged that he had been forced to take a disability retirement after he had worked in excess of twenty years. The Court of Appeals remanded that case to the District Court for further consideration (A40-A42). Unlike that firefighter, petitioners did not plead any cause of action based on an absence of choice as to disability and service retirements for those who worked twenty or more years. The six forms of relief sought by petitioner in the complaint all address the absence of VSF benefits for disability retirees as such (A129-A131). They litigated this case on a different basis than did the firefighter to whom they refer.

The argument regarding rehearing does not present any federal issue worthy of review by this Court. This Court should deny certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Municipal Respondents.

By: John Hogrogian
JOHN HOGROGIAN
Assistant Corporation Counsel

LEONARD J. KOERNER,
PAMELA SEIDER DOLGOW,
JAMES J. DWYER,
JOHN HOGROGIAN,*
of Counsel.

* Attorney of Record